THE LAW OF THE DANBURY HATTERS' CASE

By Walter Gordon Merritt, Esq.,[1]
New York.

If called upon to select the three greatest cases in Anglo-Saxon jurisprudence affecting the so-called "labor question," employer and employed would undoubtedly agree upon the Taff-Vale decision, in England, the Buck's Stove and Range Company case, now pending in our federal courts, and the Loewe case, in which judgment was entered after trial by jury for over $232,000. The importance of any one of these cases is not diminished by any other, because of the fact that the fundamental and paramount principles involved in each are separate and independent from the main principles involved in the other two.

The Taff-Vale decision deserves distinction because it was there held that any labor union, registered under the laws of England, could be sued after the manner of a corporation. As a result of the application of this principle of law to the facts in that case, the union was mulcted in damages to the amount of £135,000 for unlawfully interfering with employees.

The Buck's Stove and Range Company case, which is still in the courts awaiting a hearing and final determination from the United States Supreme Court some time in the coming fall or winter, involves fundamental principles relating to the application of equitable remedies to protect an employer against a combination of working people; the question of the illegality of the boycott, and the right of a court of equity to summarily punish a violator of one of its decrees without a trial by jury.

It is difficult to understand how any attorney can confidently dispute the established law upon most of these questions involved in the Buck's Stove and Range Company case, because of the numerous decisions that have been rendered by courts of high standing throughout the country, condemning the secondary boycott, restraining it by injunction and punishing the violators thereof for contempt without trial by jury. It is true, nevertheless, that the United

[1]Associate counsel of the American Anti-Boycott Association, which is an organization of employers that conducted this case.

States Supreme Court has never before had presented to it a case involving the application of all of these principles to a set of facts of substantially the same character as is presented in this case. So, aside from the fact that the decision of the United States Supreme Court on many of these questions can be predicted with considerable assurance, the case, nevertheless, is one of far-reaching importance, as promising a final determination by the highest court in this land of these questions of undoubted importance. The most serious contention of the defendants is that an injunction, which restrains such communications, oral or written, as are necessary to the conduct of a boycott, violates the constitutional privilege of free press and free speech. The claim is that you cannot muzzle free speech by enjoining injurious or libelous statements uttered for the purpose of destroying property, even though an action for damages will thereafter lie on their account.

The Loewe case in contrast with the Buck's case was original in its conception and therefore more of a pioneer case. The suit was the first of its kind brought under the Federal Anti-Trust Law which declares every contract or combination in restraint of interstate trade to be unlawful and gives the party injured thereby the remedy of treble damages. The allegations and proof of the case exposed a combination of two million working men called the American Federation of Labor, which had affiliated with it over thirty thousand local unions, over five hundred city trade councils, representing the different trade unions in particular cities, about thirty state federations representing all the unions in the particular states and over 100 national trade unions such as the United Hatters of North America, representing all of the unions in a particular trade. This national federation had over 1,000 organizers active in different parts of the country in pushing the sale of union label materials and boycotting and preventing the sale of non-union materials. Among these organizers were listed the traveling agents of the United Hatters of North America who were particularly engaged in preventing the sale of non-union hats and directing the attention of the other organizers, trade organizations, city councils and state federations against such non-union hats and those who dealt in them. Since 1896, the United Hatters of North America had been an integral part of this machine and had from time to time sought the aid and co-operation of all these facilities to help

it in its systematic efforts to compel all hat manufacturers to unionize their factories. The practice of the United Hatters in dealing with hat manufacturers who did not voluntarily accept its rule was uniform and notorious by reason of a few historic fights in which individual manufacturers had successively been beaten after a year or so of resistance. The first step in the plot was the strike, and if we are to judge by the Loewe case, the employees actually involved were not consulted in advance on the theory that it concerned interests broader than theirs that their employer's factory should be union. The second step was to employ spies to watch the manufacturers' shipments, ascertain the names and locations of his customers, and then despatch special agents to each point in order to intercede with each customer. If the customer was recalcitrant, the agent enlisted all the unions in that locality to aid him in compelling that customer by loss of business and fear thereof to discontinue all relations with the manufacturer.

These activities were boastfully reported by the officers of both the American Federation of Labor and the United Hatters in their conventions and local meetings as well as by a monthly official magazine and printed convention reports which were placed at the elbow of every union hat maker to read if he so desired.

Under such circumstances and conditions nearly every defendant had been continuously a member of the United Hatters of North America and the American Federation of Labor since 1896, and during the six years which elapsed between the commencement of the Loewe suit and the actual date of trial. During this same period none of the defendants had ever made any protest against the continuance of such warfare, but had continued to pay dues and without objection had suffered or aided the re-election of the same officers.

This was the setting of the drama when the Loewe trouble started, but before any steps were taken the national officers of the United Hatters called upon Mr. Loewe and informed him in no uncertain language that if he was unwilling to be unionized by *peaceful* methods they would employ the *usual* methods. Following a firm declination on Mr. Loewe's part to accede to their demands, the usual steps of calling a strike and subsequently pursuing the boycott by the use of spies to discover points of shipment and of traveling delegates to intimidate dealers were ultimately taken. Upon the

evidence submitted the presiding judge instructed the jury that the plaintiffs were entitled to recover and left it to determine the amount.

The legal questions underlying the suit brought under the Federal Anti-Trust Law upon such a statement of facts resolved themselves primarily into two important principles: 1. The application of the Sherman Anti-Trust Law to a combination of working people restraining the interstate trade of an employer. 2. The liability of a member for acts of this character performed by the officers and agents of the union.

The question of the applicability of the Sherman Anti-Trust Law to this case was determined by the United States Supreme Court in 1907, when it unanimously overruled the demurrer to the complaint. The court in passing upon this complaint held that a combination of working people who combined together to restrain a man's interstate trade through the instrumentality of a strike which prevented production at home, and the instrumentality of a boycott which prevented distribution abroad, came under the prohibition of this anti-trust law. In this connection it should be noted that more than ninety-seven per cent of the plaintiff's sales were made for and shipped to customers outside of the state where manufactured so that for all substantial purposes he was engaged exclusively in interstate commerce, and the combination, in seeking to break up his business, must necessarily have had the intention to terminate that commerce.

This decision does not mean that every strike is an offense under the Sherman Anti-Trust Law, because it prevents the employer filling his interstate contracts, any more than it means that every boycott is an offense under that law. It simply means that where a strike and boycott are employed as means to prevent the transaction of interstate commerce, they become part of an illegal scheme in violation of that statute. It has been held that a combination obtaining control of a company through stock ownership and voting to prevent that company embarking in business in order that it may not become a competitor of the people who control the stock, may constitute a combination in violation of the Sherman Anti-Trust Law, but it does not follow that the ownership and control of stock, and the exercise of voting rights thereon necessarily constitutes a violation of the Sherman Anti-Trust Law any more than a

strike, which may in some instances be lawful, necessarily constitutes a violation of that law. All of these decisions are based upon the established theory that an act, otherwise lawful and innocent, may become unlawful when it is a part of an illegal scheme to accomplish an illegal purpose.

The complaint in this action was so framed that it appeared clearly therefrom that the strike and boycott were employed as a means to carry out an illegal scheme. It was alleged that the parties entered into a combination to restrain the plaintiff's interstate commerce, and, in order to carry out that illegal purpose, adopted certain enumerated means, among which were the strike and boycott. The difficult question arose, however, as to whether proof could be submitted to sustain such an allegation, for it is undoubtedly true in most instances that a strike is entered into without the information of any intention to restrain interstate commerce and with no preconceived plans to take any further steps to injure the employer's business by an interstate boycott. In such cases it would be impracticable to prove that the strike and boycott subsequently agreed upon were part of a pre-conceived plan to restrain interstate commerce. This matter of proof is the difficulty which will confront attorneys in attempting to base future suits of this kind upon the same theory.

The proof of this allegation in the Loewe case lay in the fact that before taking any of these steps, the officers of the United Hatters negotiated with Mr. Loewe and told him they had already made up their minds to follow the usual course unless Mr. Loewe was prepared to come in peacefully. It is well to read the exact conversation which took place in a little hotel bedroom on this occasion. Mr. Moffitt, the president of the union, being somewhat impatient of Mr. Loewe's reluctance finally brought the matter to a crisis and said:

"We have talked this matter over. We have endeavored to show you that it would be to your advantage to unionize your factory, and we might just as well be frank with you—we have made up our minds that this factory is to be unionized, and we hope to accomplish this in a *peaceful* way. If you don't come in that way, we shall use our *usual* methods to bring it about."

Mr. Loewe replied: "Mr. Moffitt, do you mean to say that if I am not willing to unionize the factory that you will use force?"

And Mr. Moffitt, answering, said: "Yes, Mr. Loewe, to be frank with you, we shall use force." Then, after hesitating, added: "That is, we shall create such a demand for the union label that you will be forced to adopt it."

Later, in another interview, Mr. Moffitt reminded Mr. Loewe that they had spent $23,000 to force their last victim to go union, and that he should remember the unions had never lost a case. None of these facts were controverted so that the undisputed evidence of the case showed that when Mr. Moffitt and the other officers of the union gathered together to talk to Mr. Loewe, they had in their minds at that time an agreement or plan to pursue the same methods with Mr. Loewe as they had pursued with other manufacturers, and that these methods were to first cut off all production at home by a strike, so that no goods could be furnished to fill his orders, and then to interfere with the taking of further orders through the employment of the boycott. It would be unusual more clearly to prove a case of men conspiring together to interfere with a man's interstate trade and employing the weapon of a strike and a boycott to accomplish that end. These statements by Mr. Moffitt in the presence of his associates and in advance of all steps to the effect that they had in mind the intention of pursuing these various steps to accomplish their ruinous end with a man whose business was ninety-seven per cent interstate show that both of these steps were part of a general scheme to effect the purpose prohibited by our Federal Anti-Trust Law. If the proof had shown an ordinary strike for higher wages, the situation would have been different, but this interview with Mr. Moffitt and others showed that this operation of the union was but a part of the general scheme of the American Federation of Labor and United Hatters to unionize all factories and prevent the transaction of commerce in goods not made by union factories.

The second fundamental principle involved in this case was the liability of the individual members of the union for the acts of their officers and agents. The question of the application of the Sherman Anti-Trust Law was secondary in importance to this for the repeal or amendment of that law may at any time undermine the value of this precedent on that point, while the question of the liability of a member of a union for the acts of the organization is one of as enduring importance as labor organizations themselves. While this

case surpasses all other cases of its kind in importance because of its solution of this question, it must, nevertheless, be remembered that the determination of this question depended upon the application of an ancient salutary and simple rule of law. No one questions the justice and desirability of that principle of law which says that a man must be liable for what his agents do when acting in his behalf. If you are to receive the benefit of a man's activities you must also bear the liabilities incident thereto. You cannot send a man out into the world to act for you and escape responsibility for the harm he does when so acting. The principle is applied in manifold ways to the daily occupations and relations of our people, and there is no cry, such as has been raised in this case, that it works injustice.

If I own a newspaper and employ a man to report for it, I am liable for any libel which he publishes even though he may have done it contrary to my warning and express instructions. It is true that all the warnings and cautions which an employer may give his chauffeur against reckless driving will not protect that employer against an action for injury to a child caused by his chauffeur's negligent driving. So also, if I employ a man to buy and sell merchandise for me and carefully instruct him to the effect that I wish to succeed by honorable means only, I am nevertheless responsible for any fraud he may commit while engaged in this work. These are a few illustrations of the just and unquestionable character of the rule applied in the Loewe case to the effect that every man is liable for all acts done by his agents while in pursuit of his principal's business.

Let us assume that in this Loewe case the liability of some of the defendants at least rested solely on this principle. At least some of the defendants knew nothing of the plaintiffs or their business and had never taken direct and active participation in any boycott or strike against the plaintiffs. They were selected from among that group of working people who have been thrifty and conservative enough to amass property, and it is to the shame of organized labor that these men seldom, if ever, take any active or leading part in the operations of the union. Therefore, for the purpose of discussing this question, I consider only those defendants whose connection with this conspiracy was the most remote.

It would seem at the very outset that in the absence of any

further evidence than the fact that these men belonged to a labor union whose officers are doing this work, the question of liability is clear. Are not all the acts of which we complain of the very essence of trade unionism and does not the performance of any one of them, for the benefit of the members, constitute an act within the scope of the employment of the union's officers. By its very nature, the union is a combination in restraint of trade which seeks to obtain concessions for its members through the employment of concerted action. This concerted action is ordinarily applied in the two ways that were complained of in this case. It is either through the concerted withdrawal of men from employment, or the concerted withdrawal of patronage that it seeks to accomplish its ends.

This does not mean that necessarily every union is organized for unlawful purposes, but it does mean that the general nature of their operations are of such a character that any unlawful strike or boycott carried on by its officers, in behalf of its members, even though not expressly authorized, is within the scope of the employment of the officers. If this theory is correct, it is true that any provision in the constitution of a union forbidding its officers from conducting any *unlawful* boycotting, or instituting any *unlawful* strike will be no more protection to the members in an action for damages due to such unlawful strikes or boycotts than would be the instructions of an owner to his chauffeur not to be reckless. Thus, if we assume, as has been held in some states, that peaceful picketing is lawful, the union and its members would nevertheless be liable for any unlawful act on the part of its pickets while pursuing the business of picketing, even though that picket had been expressly instructed to keep within the law.

There was much additional evidence in the Loewe case growing out of certain clauses in the union's constitutions on which the liability of individual members might be based, but it is important to dwell upon this general principle which would become applicable to all labor unions and all labor union suits rather than upon certain clauses in the constitution which may be peculiar to this particular case and which might be altered and corrected as a safeguard against a successful repetition of a similar suit. If the principle herein presented is sound, it must necessarily follow that every member of every labor union is responsible for all acts in the nature of strikes or boycotting lawful or unlawful which are carried on

by its officers and agents for the benefit of members. A walking delegate who calls a strike on a building in order to induce the employer to pay him a bribe, does an act for which the membership is not responsible because he is seeking his own personal ends and not acting in furtherance of the interests of his principals. If, however, he does the same act for the benefit of his membership, it seems to me beyond question that they are all responsible.

In the Loewe case the constitution of the United Hatters of North America of which every one of the defendants was a member, dissipated all doubts as to the liability of members for acts done to unionize factories as it expressly authorizes the officers to use all means within their power to turn all hat factories fair. It would have been immaterial if that constitution had so read that the officers were authorized to use only lawful means to turn factories "fair," for the true test is not whether they were expressly authorized to do anything unlawful, but whether the unlawful acts were done in furtherance of the purposes which they were employed to carry out and were possibly adapted to the attainment of those purposes. So when the constitution authorized these officers to use all means within their power to turn a factory "fair," they were responsible for both lawful and unlawful means employed for this purpose even as the owner of the newspaper was responsible for the unlawful libel published by this reporter. Under the constitution of the United Hatters every one of the 9,000 members of that organization was liable for all acts of the officers and agents done for the purpose of turning hat factories fair.

The constitution of the American Federation of Labor of which every defendant, in common with 2,000,000 other employees in this country, was a member, presented an equally clear case, for, according to the statement of Mr. Gompers in a petition filed in this case in the United States Supreme Court, it was admitted that the constitution of the American Federation of Labor made special provision for the prosecution of boycotts, and it was further stated that the prosecution of such a conspiracy as was set forth in this case was necessary in order that the American Federation of Labor might attain its purposes. Under this constitution providing for treatment of trade disputes and the appointment of boycott committees, every one of the 2,000,000 members of that organization was responsible for all acts of boycotting that

were carried on by Mr. Gompers and his associates and for all unfair lists and boycotting statements published in the "American Federationist." If the general principle first suggested that any act in the nature of boycotting and striking is within the scope of any labor union and is not applicable, the question was clearly settled in these two particular unions by the constitutions which bound each and every one of the members.

Another aspect of the case which still further clinches the liability of every member of these unions is the fact that the American Federation of Labor and the United Hatters of North America each held periodical conventions to which delegates were sent after a regular election in which each member was permitted to participate. The delegates to these conventions had full power and authority to bind the members as to all matters connected with their organization and the laws passed at those conventions were supreme and of the same force and effect as the constitution themselves. At each of these conventions the delegates heard and approved full reports from their officers concerning the many boycotts that had been levied throughout the country including boycotts upon different hat manufacturers, and elected the same officers. At the conventions of the United Hatters, the strike and boycotting of the Loewe concern were also considered, and all acts, strikes or boycotts were unanimously approved. Inasmuch as every delegate who attended any one of those conventions was a proxy of the individual members, any knowledge which he obtained concerning boycotting was their knowledge, and any act or vote which he exercised approving or authorizing certain boycotts was their act.

To fully understand the force of the ruling of Judge Platt when he instructed the jury that all the defendants were liable, it should also be remembered that all reasonable efforts were made by the officers of the United Hatters to fully inform the members from time to time of the various strikes and boycotts which they had instituted. Convention reports were printed and a monthly journal published for this purpose and both were made available, without charge, for all who cared to read. It was even suggested by the testimony of some of the defendants that those startling reports of the officers and agents, rather exaggerated the ruinous efficiency of their work in order to win approval for re-election

and re-appointment. The essential point, however, is that no fraud or concealment was practised by the officers behind which the membership might find justification for their claimed ignorance. The officers never doubted but that they were acting in accord with the wishes of all members.

There is to be added to all of these grounds of responsibility of the individual members a final ground which in my mind is of more moral importance than all the other grounds combined. Every defendant constantly paid dues to support the officers of the United Hatters and of the American Federation of Labor in the conduct of these boycotts and after this suit was started and all of these defendants were served with papers which informed them of the work that was being carried on by their organizations, they did not withdraw from the organization like innocent men who had suddenly learned that their organization was doing wrong, but they continued to pay dues and re-elect the same officers without a warning or protest and in these two ways continued the wrong doing of which the plaintiffs complained.

This summary omits essential facts which connected many defendants with the wrong-doing and only too briefly touches the essential points of liability applicable to every defendant. Judge Platt believed the situation presented was largely one of law and that under the law the facts conclusively sustained the liability of all. For this reason he instructed the jury that the plaintiffs were entitled to recover and left it to determine the amount. The fact that the jury brought in a verdict for nearly the full amount indicates the trend of their sympathy and supports the contention that the issue would not have been otherwise had all the questions been left to them.

The fundamental principle reaffirmed in this case is the individual responsibility of every member of a union for all acts done by its officers and agents in furtherance of its object and purposes. It says to every union man "you cannot safely continue a member of an organization of wrong doing; you must reform it or leave it." It places a responsibility upon the conservative, property-owning class to be vigilant as to the conduct of union officials. So when, directly or indirectly, a union man becomes a member of the American Federation of Labor with a constitution providing for boycotting and his dues are used to support the machinery of

boycotting, he cannot repudiate his liability for all damages caused thereby.

This principle of responsibility says to the employer who is being boycotted or otherwise wrongfully injured by the union that when the power and resources of an army of men are arrayed against him and cause him damage, commensurate with the strength of the attack, he is not limited in redress to the inadequate resources of two or three union officials who have actively conducted the wrong doing.

Any other rule of liability for union members would be hopelessly inadequate. It would penalize vigilance and reward irresponsibility. If liability for association acts can be confined to its officers by mere ignorance of their conduct on the part of the general membership, judgment-proof officers will be elected and all opportunity for the members to be acquainted with the activities of the association's officers will be withheld for corrupt and ulterior motives.